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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No.

78-958

CITY OF FAIRFAX, VIRGINIA

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT
AUTHORITY, *et. al.,**Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The central issue in this case is whether there has been an anticipatory breach of the Capital Contributions Agreement by the respondents. The questions as presented in the Petition do not clearly raise that issue. Question No. 1, as set forth in the Petition, avoids this issue by assuming a breach of contract and focusing instead on the consequences of a breach. Similarly, ques-

tion No. 2 obfuscates this central issue by focusing on provisions which do not go to the essence of the contract.

The determination of whether there has been an anticipatory breach is governed by the common law of contracts and presents the following questions:

1. Whether the Court of Appeals was correct in holding that the common law doctrine of anticipatory breach of contract, upon which petitioner has relied throughout this litigation, requires a showing of an unequivocal refusal to perform the essence of the contract and that the refusal must be of such substantial character as to defeat the object of the parties in making the contract.

2. Whether the Court of Appeals correctly held that there has been no anticipatory breach or repudiation of the Capital Contributions Agreement since construction of the K Route was the consideration the petitioner bargained for in that Agreement, and there has been no repudiation of the commitment to construct the K Route, which is still part of the planned Metrorail system.

3. Whether the Court of Appeals correctly held that petitioner was not entitled to restitution of its entire contribution to the Metrorail system since petitioner does not contend that there has been a repudiation of the basic objective of the contract and now relies on nothing more than alleged breaches of subsidiary provisions of the Capital Contributions Agreement from which absolutely no harm flowed.

STATEMENT OF THE CASE

The facts of the case are stated fully and accurately in the decision of the Court of Appeals (Pet. App. 1a-28a),¹

¹ Petitioner's Appendix is referred to as (Pet. App.). The Petition for a Writ of Certiorari is referred to as (Pet.). The Joint Appendix is referred to as (A.). The Exhibit Volume of the Joint Appendix is referred to as (A. Exh.).

and will be referred to only as necessary to provide the factual basis for the Court of Appeals' decision.²

This case involves petitioner's contention that the respondents have committed an anticipatory breach of the Capital Contributions Agreement of 1970 (A. Exh. 306-24). That Agreement, executed by all of the parties to this action, provided the local share of the initial \$2.5 billion in federal and local funds for construction of Metrorail, the one hundred mile rail rapid transit system for the Washington, D.C. area. Petitioner contributed approximately \$2 million toward construction of the Metrorail system.

Petitioner's object in executing the Capital Contributions Agreement was to secure the construction of the K Route running from Rosslyn to Vienna near the petitioner's border. This single goal is illustrated by petitioner's complaint demanding in the alternative either a mandatory injunction ordering the completion of the K Route or damages in the amount of its entire contribution to the project (Amended Complaint; Pet. App. 17a). Petitioner's counsel argued to the District Court that,

[W]hat the City of Fairfax bargained for and bought with its \$2 million, was the Nutley Road station [now referred to as the Vienna Station]. They didn't bargain for ridership. They didn't bargain for a piece of the hundred mile system or access but they wanted what they bargained for and what they insisted was that they have the right to have that Nutley Station for their money . . . Your Honor, well that benefit has been taken from them as the Court has found. It has been, then they're entitled to their money back. They're entitled to restitution

² Many of the facts alleged throughout the Petition are incorrect and unsupported by the record. Rather than burden this Court with a detailed list of these factual errors, we refer this Court to the decision of the Court of Appeals.

from the bargain which they bought. (Hearing on Damages, R. 258).

Petitioner's City Manager underscored how completely its case depends on the fate of the K Route. At his deposition as petitioner's Rule 30(b)(6) representative, he testified as follows:

Q. Assuming that the Nutley Road Station [now referred to as the Vienna Station] could be built by, say, between 1982 and 1984, would Metro have complied with its obligations under the Capital Contributions Agreement of 1970?

A. In my opinion, yes, sir. (A. 122; Pet. App. 17a).

In fact, the bulk of petitioner's efforts in the District Court were directed toward proving that the K Route would never be completed, and that this constituted the breach of the Capital Contributions Agreement.

By 1976 the projected cost of completing construction of the Metrorail system had increased to approximately \$5 billion. The \$2.5 billion made available under the 1970 Capital Contributions Agreement was not enough to complete any of the K Route. Accordingly, an interim finance plan providing additional local and federal funds was implemented. The local share of these funds is obligated under the Interim Capital Contributions Agreement (A. Exh. 228-6). This interim finance plan will enable the Washington Metropolitan Area Transit Authority ("WMATA") to complete 60 miles of the 100 mile system. It funds the K Route to Glebe Road, along with practically all of the Metrorail construction which was not held up for one reason or another, such as I-66 delays (Pet. App. 9a, 26a-27a) or Alternative Analysis (Pet. App. 9a, 22a, 25a, 27a).

Funding of the K Route west of Glebe Road was not included in the interim plan because it was planned to be constructed in the median of I-66, and construction

of I-66 was enjoined until well after this litigation was commenced (Pet. App. 9a, 26a-27a; A. 98, 119, 199-200, 204-5, 211, 337-8, 343-4, 724, 751). This inability to begin construction on the K Route west of Glebe Road precluded its federal funding in 1976.³

Before the District Court, petitioner contended that, since the Interim Capital Contributions Agreement did not provide funds for the construction of the K Route beyond Glebe Road, the respondents had determined that Route K should not be built and, accordingly, had committed an anticipatory breach of the Capital Contributions Agreement. The District Court agreed:

The breach in this case occurred when WMATA approved the interim capital contributions agreement on December 2, 1976. That amendment terminated the K Route at Glebe Road in Arlington—a substantial reduction in facilities serving the City of Fairfax. (Pet. App. 46a).

Based on this finding of a total breach of contract, the District Court awarded restitution of petitioner's entire \$2 million contribution to the Metrorail system plus interest from December 2, 1976 (Pet. App. 46a-47a).

³ In the development of guidelines and requirements for funding the federal contribution to Metro construction, the Urban Mass Transportation Administration ("UMTA") imposed an operable segment policy on WMATA which prohibited funding segments of the system which could not be completed to operation. Under this policy the Federal Government would fund construction of only those portions of the system which were contiguous to operating portions and which could be made operational in the near future (A. 326, 329-31, 344, 694-5). Because the I-66 litigation inhibited beginning construction of the K Route, that route was not an operable segment and could not be included in the UMTA funding packages (A. 314-5, 344, 724). With federal funding thus unavailable for the outer half of the K Route, only the inner half could be included in the interim financial plan (A. 170).

After a careful review of the evidence, the Court of Appeals found that rather than "terminating" the K Route,

. . . [T]he defendants have aggressively pressed on with plans for the construction of the system along K Route beyond Glebe Road. They have completed alternatives analysis study and have reaffirmed their commitment to the completion of the K Route. They are even now engaged in the preparation of a contribution and construction schedule for the project. The defendants are confident that within the time provided for completion of the system Route K beyond Glebe Road will be constructed (Pet. App. 27a).

The petitioner no longer contends that the respondents have eliminated the K Route from the Metrorail system. It abandoned this contention in its brief to the Court of Appeals, where it stated that ". . . the K Route remains a part of ARS-68 (Revised)", and even argued that the District Court did not find a truncation of the K Route (Appellee's Brief, 27, 21-2, 26, 30; Pet. App. 23a).

The Petition apparently does not attempt to revive the initial claim that the K Route has been eliminated from the system. Rather, petitioner relies in this Court, as it did in the Court of Appeals, on three of its subsidiary allegations of breach of contract: (1) that the respondents have delayed completion of the K Route relative to other routes in the Metrorail system (Pet. 21-22, 26-27); (2) that WMATA deferred making the recomputation called for in paragraph 3.3 of the Capital Contributions Agreement (Pet. 13-17, 22-23); and (3) that, even though "the K Route remains a part of ARS-68 (Revised)", the respondents have repudiated an intention to construct the K Route "pursuant to the terms" of the Capital Contributions Agreement (Pet. 20). No evidence of harm flowing from any of these alleged breaches was presented. Petitioner's evidence of damages was

limited to a showing of the amounts and dates of its contributions, along with testimony directed toward minimizing the benefit it would receive from a Metrorail system without the K Route (Hearing on Damages, R. 14-15, 17-22, 172-181).

Applying traditional concepts of contract law, the Court of Appeals found that none of these allegations amounted to the total repudiation of the contract required to support a finding of anticipatory breach (Pet. App. 23a-27a, nt. 20, 23a). The Court of Appeals characterized petitioner's position as:

[N]o more than an argument that, if one party to a contract violates any provision of a contract, whatever its materiality, such violation will represent an anticipatory breach, giving the other party the right to recover damages for breach of the entire contract. (Pet. App. 23a).

Accordingly, the Court of Appeals dismissed petitioner's action as premature. (Pet. App. 28a).

ARGUMENT

None of the special and important reasons which would warrant review on certiorari are present in this case. There is no federal question involved, no constitutional issue, and no conflict with the decision of another Court of Appeals. There is no basis for petitioner's contention that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The only questions the petitioner has presented for review are whether the Court of Appeals interpreted and applied a common law contract doctrine in conflict with pre-*Erie* decisions of this Court. Even if these issues were worthy of consideration by this Court, the record in this case shows that the Court of Appeals correctly interpreted the

common law doctrine of anticipatory breach of contract, and correctly applied that doctrine to the evidence presented in the District Court.

I. The Common Law Doctrine of Anticipatory Breach of Contract was Interpreted In Accordance with Established State Law and Pre-Erie Decisions of this Court.

Petitioner claims that the decision below conflicts with the reasoning in several contract cases decided by this Court prior to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (Pet. 18). There is no such conflict. In the course of a lucid and thorough analysis of numerous federal, state and other authorities, the Court of Appeals emphasized the two basic, time-honored elements of the anticipatory breach doctrine. First, it must be shown that the defendant unequivocally and unconditionally refused, in advance, to perform the contract at the time set for his performance (Pet. App. 11a-15a). Second, there must be a repudiation of the very essence of the contract: "the breach must be 'so material and substantial in nature that it affects the very essence of the contract and serves to defeat the object of the parties'" (Pet. App. 15a).

Petitioner ineffectually attacks this recitation of standard black-letter law. Petitioner asserts that the Court of Appeals misinterpreted this Court's decision in *Dingley v. Oler*, 117 U.S. 490 (1886) "in a manner which vitiates the doctrine of anticipatory breach," and establishes "a rule of law that repudiation of a contract must deny the intention to perform at 'any time'" (Pet. 18). Contrary to this assertion, the Court of Appeals did not disregard time of performance, but clearly stated that the doctrine calls for a refusal on the part of the defendant to perform "at the time set for his performance" (Pet. App. 12a). In reversing the judgment of the District Court, the Court of Appeals dismissed the action as premature

without prejudice to petitioner's right to bring such other actions as may be appropriate "if it develops that the defendants have unequivocally abandoned hope of constructing Route K beyond Glebe Road, as provided in the 1970 Agreement, or if Route K is not completed within the time fixed for the completion of the system in the 1970 Agreement . . ." (Pet. App. 28a).

Having abandoned before the Court of Appeals its original contention, on which the litigation was based, that respondents had eliminated the K Route from the Metrorail System, petitioner urged that the failure of WMATA to make the recomputations provided for in the Capital Contributions Agreement constituted an anticipatory breach of that Agreement. The Court of Appeals held that for a number of reasons, including the unavailability in 1974 of supplemental federal funding, it would "have been an entirely futile exercise" to make the recomputation (Pet. App. 24a-25a). Accordingly, the Court held that the failure to make the recomputation "was immaterial, so far as the accomplishment of the objective of that Agreement was concerned" and could not constitute a breach of such substantial character as to defeat the object of the parties in making the contract (Pet. App. 24a).

Petitioner challenges this well-documented and well-reasoned conclusion of the Court of Appeals with the bare, unsupported, and unsupportable assertion that failure to make the recomputation has rendered impossible performance of the Capital Contributions Agreement (Pet. 23). Quite apart from its lack of merit, petitioner's disagreement with the finding of the Court of Appeals that the failure to make the recomputation was not substantial or material does not merit the exercise of certiorari jurisdiction.

Petitioner, in an effort to elevate the recomputation issue to a basis for granting certiorari, contends that the

Court's ruling somehow creates a new doctrine which unsettles contractual relations and has a chilling effect upon federally assisted transit and other local public projects (Pet. 13-17). In so contending, petitioner misconstrues the ruling of the Court. That ruling held that the unavailability of federal funds simply made the re-computation a futile exercise at the time, but was immaterial so far as the accomplishment of the objective of the Capital Contributions Agreement was concerned. (Pet. App. 24a-25a).

As an example of the chilling effect created by the Court of Appeals' ruling, the petitioner states, ". . . the most graphic demonstration of the decision below is the financial crisis which struck the City of New York [in 1975]" (Pet. 16). At that time New York was on the verge of defaulting on \$2.5 billion in short-term obligations, but managed to avoid default with federal assistance. Petitioner argues that if federal assistance had not been forthcoming and New York had defaulted, the application of the "doctrine created in the decision below" would have "excused" the default, leaving the creditors unpaid (Pet. 17).

The crucial difference between New York's potential default and the default petitioner alleges here illustrates the fundamental defect in petitioner's case. New York's breach would have been material: it would have vitiated the object of the contracts of its creditors, and their claims for payment would have been recognized. Petitioner, on the other hand, has failed to prove a material breach. Its contention in the Court of Appeals and now in its Petition is that it is entitled to a refund even though it has not been harmed by any of the supposed breaches to which it points. Even though it will benefit from the construction of the K Route, it would also like its money back. In effect, petitioner is demanding \$2 million in nominal damages. The reasoning of the Court

of Appeals in denying this demand is entirely consistent with the pre-*Erie* contract decisions of this Court.

II. Petitioner's Contention That The Decision Below Does Not Conform To Accepted Standards of Judicial Review Is Without Merit.

Petitioner asserts that the Court of Appeals made "two factual conclusions which were plainly wrong and which conflicted with the findings of the District Court," and that these errors represent such a departure from accepted standards of review that the supervisory powers of this Court should be exercised (Pet. 23-28). Even if it were appropriate to grant certiorari solely to review the factual conclusions of the Court below, there is no basis for such a review in this case. The District Court's finding of an anticipatory breach of contract was reversed on the grounds that it was clearly erroneous because there is no evidence in the record of such a breach. There has been no repudiation of the object of the Capital Contributions Agreement: the construction of the 100 mile Metrorail system, including the K Route to Vienna. In fact, all of the respondents are aggressively pressing forward with plans for the financing and construction of the entire system.

Petitioner's alleged "erroneous factual conclusions" are frivolous and immaterial. The first of these is an allegation that the Court below failed to recognize that the K Route was not included in UMTA's original demand for Alternatives Analysis, but rather was added later at the respondents' request (Pet. 24-26). However, the Alternative Analyses studies reaffirmed the respondents' intention of constructing the K Route, and thus certainly cannot constitute evidence of an anticipatory breach of the Agreement. Petitioner's contention that the injunction against construction of I-66 did not constitute an impediment to construction of the K Route (Pet. 26-27)

plainly lacks merit. The Court of Appeals correctly found that there is complete integration of the two projects, and construction of the K Route could not proceed in the median of I-66 while that project was in doubt (Pet. App. 26a).

Petitioner's rights have been preserved. In the event that there is an actionable breach of the Capital Contributions Agreement in the future, petitioner is free to bring such other actions as may then be appropriate (Pet. App. 28a).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 1979, three copies of the foregoing Respondent's Brief In Opposition were mailed, postage prepaid, to John H. Rust, Jr., Rust, Rust and Pratt, 4009 Chain Bridge Road, P.O. Box 537, Fairfax, Virginia 22030, counsel for petitioner.

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